84-89

No. 83-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOHNSON & JOHNSON,

Petitioner,

—v.—

STANLEY McDONALD, NORMAN R. HAGFORS, and CLAYTON JENSEN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Where the Court of Appeals finds that prejudice requires reversal of a verdict obtained on one alternate theory of a single, unitary claim, does affirmance of a verdict on another alternate theory for the same claim constitute denial of the rights to a fair trial and to a trial by an impartial jury?
2. Does the filing of spurious antitrust claims made for the purpose of inflaming the jury on common law claims have their own anti-competitive effect?

LIST OF PARTIES TO THE APPEAL IN THE EIGHTH CIRCUIT

The names of all of the parties to the appeal in the Eighth Circuit are provided in the caption to this petition. Sup. Ct. R. 21.1(b). Pursuant to Rule 28.1, the following are all of the affiliates of Johnson & Johnson, other than wholly-owned subsidiaries:

ens Biologicals, Inc.
Enzo Biochem, Inc.
Immunomedics, Inc.

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OPINIONS BELOW

The opinions of the Court of Appeals in this matter dated November 16, 1983, and January 12, 1984 (granting Johnson & Johnson's first petition for rehearing) appear at 722 F.2d 1370, and are annexed hereto as Appendices A and C, respectively. The order of the Court of Appeals dated February 28, 1984 denying a second petition for rehearing by Johnson & Johnson ("J&J") is annexed hereto as Appendix D. The opinion of the district court is reported at 537 F. Supp. 1282, and annexed hereto as Appendix B.

JURISDICTION

The original opinion of the Court of Appeals entered on November 16, 1983 (the "First Opinion") reversed and dismissed an antitrust judgment of $170 million, reversed a fraud punitive damage award of $25 million and affirmed a fraud compensatory damage award of $6.275 million. All of of these judgments were entered on verdicts after a six month jury trial before Hon. Miles W. Lord, U.S.D.J., in the U.S. District Court for the District of Minnesota. In the opinion on the first rehearing dated January 18, 1984 (the "Second Opinion"), the Eighth Circuit remanded the fraud compensatory damage award and for the first time addressed and affirmed one of three alternative judgments, the $5.7 million award on the verdict for alleged breach of contract.[1] On February 28, 1984 it denied without opinion a second rehearing petition by J&J limited to this third alternative judgment on plaintiffs' unitary claim. Plaintiffs then obtained full satisfaction of this judgment after they secured an advisory opinion from Judge Lord that such full satisfaction on this alternative judgment would not extinguish their right to obtain still more monies on the fraud theory, both by way of compensatory and punitive damages.

Pursuant to 28 U.S.C. § 2101(c), this petition seeks to review the affirmance of the $5.7 million contract judgment. It was timely filed on July 16, 1984, per an extension granted by Mr. Justice Blackmun. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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1 The plaintiffs have also filed a petition for certiorari seeking review of the dismissal of their antitrust claim and reversal of the fraud judgments, No. 83-1659.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

United States Constitution, Amendment VII:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."

STATUTES INVOLVED[2]

Sherman Act §§ 1, 2 (15 U.S.C. §§ 1, 2)
Clayton Act §§ 4, 7 (15 U.S.C. §§ 15, 18)

STATEMENT OF THE CASE

In this case a $5.7 million verdict on one of three general verdicts has been permitted to stand in the face of a determination by the Court of Appeals that the theory underlying all of the three general verdicts was prejudicial. Plaintiffs, three individuals, recovered alternative judgments on a single claim under three alternate theories: antitrust ($170 million), fraud ($31 million) and breach of contract ($5.7 million). In plaintiffs' own words, their case consisted of "a single course of conduct causing a single injury" (7/21/81 Tr. p. 22). Their single claim was that J&J acquired their business for the purpose of "suppressing" it so that it would not erode J&J's position in the analgesic drug market.

The Court of Appeals dismissed the $170 million antitrust judgment based on this claim. It also found that the inflammatory antitrust theory prejudiced the jury and polluted both fraud verdicts, totalling $31 million. It therefore reversed and remanded the fraud claims for re-trial. It affirmed the third

2 These statutes are set forth in full in Appendix E annexed hereto.

alternate judgment on the contract theory, but gave no explanation as to how the contract verdict, based upon the same claim as the fraud verdicts, was not polluted with the same prejudice, and how affirmance of that verdict could be made without transgressing the bounds of due process and the right to an impartial jury trial.

Plaintiffs' business, StimTech, made and sold electronic pain control devices called TENS (transcutaneous electronic nerve stimulators). Under the 1974 contract of sale, plaintiffs received \$1.3 million in cash plus the right to receive up to an additional \$5.7 million based upon an "earn-out" clause keyed to profits of StimTech during 1975-1979. The contract of sale required J&J to use its "reasonable business judgment" in operating StimTech during the earnout period, and the parties stipulated that breach of that contractual provision required proof of actual bad faith conduct on the part of J&J (Tr. 9163-64).

J&J invested an additional \$10 million in StimTech during the earnout period and increased annual TENS sales sevenfold to over \$5 million, making StimTech the number two firm in a crowded industry with over 30 participants (DX-340; Tr. 6061-62; 10,169-73). Nevertheless, during the 1975-79 period StimTech made no profits, but lost over \$7 million (DX-110).

At the end of the earnout period plaintiffs sued, seeking damages for common law fraud, breach of contract and antitrust violations. As plaintiffs themselves delineate their claim, "the single issue underlying all of the plaintiffs' claims was whether J&J acquired the plaintiffs' business for the purpose of suppressing TENS devices" (Pet. for Rehearing to the Eighth Circuit, pp. 3-4).

Plaintiffs charged that to carry out the plan of suppression, J&J in bad faith orally "promised" plaintiffs prior to entering into the 1974 contract that they would in fact receive the maximum earnout of \$5.7 million despite the explicitly contingent nature of the earnout clause of the contract.

The first two oral promises which the complaint charged were made by J&J and which were sued on for breach of contract and fraud were the following:

> "(a) That defendant was certain that, over the five year payment period set forth in the agreement, plaintiffs would receive the maximum amount of $7,000,000.00 provided for in said agreement, and that there would be no problem in plaintiffs' receiving said $7,000,000.00 in exchange for their stock.
>
> (b) That not only was defendant confident that plaintiffs would receive $7,000,000.00 for their stock, but that plaintiffs would in fact receive $7,000,000.00 [$5.7 million as the full earnout plus the $1.3 million minimum]."

Judge Lord charged the jury that if they found that J&J represented to the plaintiffs that it intended "to operate StimTech so as to assure plaintiffs of the full earnout" (Tr. 12,682), plaintiffs were entitled to a verdict on the fraud and contract theories. He not only refused to apply the parol evidence rule despite a clause in the contract which provided that it "sets forth the entire understanding of the parties and it shall not be changed orally", but instead charged the jury that they could return a verdict on the contract theory based upon "whatever you find the contract to be" (Tr. 12,673).

Plaintiffs nevertheless have repeatedly conceded that they would not be entitled to recover under these "oral promises" unless J&J made such promises in bad faith.[3] There was, however, no direct evidence of any intentional mismanagement of StimTech by J&J, and it is inherently incredible that J&J would intentionally injure itself by mismanaging StimTech in order to avoid paying plaintiffs any money on the earnout. If

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3 *See, e.g.*, plaintiffs' main brief on appeal (p. 93):

> "More important, the court also instructed the jury that it could return a verdict for the plaintiffs on their fraud and contract claims only if it found bad faith by J&J, *i.e.*, willful suppression of StimTech. . . . The parties tried the case on exactly this theory."

plaintiffs made money on the earnout, at the end of the earnout period, J&J would have been in the possession of a business of established profitability.

Plaintiffs used its antitrust charges, asserted at the end of the complaint, as an afterthought and for settlement purposes (Tr. 9307-08) to provide an aura of superficial plausibility over what was inherently incredible. Their theory was that J&J deliberately mismanaged, *i.e.* "suppressed," StimTech and lost millions in doing so so as to prevent StimTech from taking sales away from analgesic drug businesses operated by J&J and other drug companies.

Plaintiffs used the suppression theory as the vehicle for obtaining the antitrust, contract and fraud verdicts. Because there was no direct evidence of any intent by J&J to mismanage StimTech, plaintiffs proceeded to second-guess virtually every business decision made by J&J in operating StimTech, and claim it was motivated by bad faith. Even plaintiffs, however, had to concede that each of these challenged decisions was consistent with good faith judgment (Pl. j.n.o.v. br. p. 450).

Plaintiffs obtained their verdicts by arguing throughout the trial and by prevailing upon Judge Lord to instruct the jury that they could infer "suppression" of StimTech by virtue of the evidence of J&J's size and its successes in marketing other products (Tr. 12,738-39). It was this prejudicial evidence which comprised most of the six month trial. Judge Lord also charged that J&J had an affirmative duty under the antitrust laws to make StimTech successful and the failure to do so constituted an intentional, illegal *per se* conspiracy in violation of § 1 of the Sherman Act (Tr. 12,740-41).

In addition to these patently erroneous jury charges, Judge Lord made highly prejudicial antitrust rulings during the trial. For example, he received in evidence an antitrust damage schedule which showed that, had plaintiffs (rather than J&J) operated StimTech during 1975-1979, the company would have sold $5 billion of TENS devices, i.e., one device for every eight

adults in the Western world (Tr. 3641-44; PX-1217). By admitting this outrageously incredible evidence and informing the jury that they could reasonably accept it as fact, the trial court gave tremendous persuasive force to plaintiffs' claim that, but for J&J's purchase and operation of StimTech, plaintiffs would have caused TENS to displace a huge percentage of the analgesic drug market. The trial court also pushed the intracorporate conspiracy concept to impossible limits by telling the jury that J&J had the duty to compel its wholly-owned subsidiaries to compete with one another (Tr. 12,714), or, as plaintiffs in their petition for certiorari have put it (p. 22), J&J was "guilty" of "forcing StimTech and other J&J subsidiaries" not to compete with one another.

Under the law as it is existed even prior to this Court's recent ruling in *Copperweld Corp. v. Independent Tube Corp.*, 52 U.S.L.W. 4821 (June 19, 1984), it was lawful for a parent corporation to assign marketing responsibilities on an exclusive territorial basis to various subsidiaries. The antitrust laws do not require a parent to force its subsidiaries to compete with each other.[4]

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[4] *See, e.g.*, *In re Penn Central Securities Litigation*, 367 F. Supp. 1158, 1166 (E.D. Pa. 1973) (defendant did not violate antitrust laws in preventing partially owned subsidiary from competing with other subsidiaries; its conduct "involve[d] the perfectly legitimate determination that it would not be in the best interests of the Pennco family to have each of its three subsidiaries competing against one another"); *In re REA Express, Inc.*, 412 F. Supp. 1239, 1256 (E.D. Pa. 1976) ("[t]he law is plain that a wholly-owned subsidiary has no right to economic independence of . . . its parents . . . and that no antitrust claims may be founded upon the absence of such independence."); *Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841, 860 (N.D. Cal. 1979), *aff'd* 658 F.2d 1256 (9th Cir. 1981) (two affiliated firms did not violate Section 1 by coordinating their rates and tariffs under the supervision of their common owner because the setting of prices "of course is an integral part of the operation of any enterprise and is a legitimate concern of those who own and control it.") *See also* Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U. L. Rev. 20, 24, 28-29 (1968); Handler, "Through the Antitrust Looking Glass," 87 Calif. L. Rev. 182 (1969).

Yet during the trial, Judge Lord ruled that J&J's failure to mandate such intra-corporate competition constituted a "conspiracy" between it and its various subsidiaries (Tr. 7588-94); J&J's witnesses were repeatedly cross-examined regarding the iniquities of these intra-corporate "conspiracies" (Tr. 5247-49; 5269-75; 5516-25; 7559-78; 9825-37). Thus plaintiffs devoted a substantial amount of their closing to these "silent" conspiracies, likening them to the assassins of Julius Caesar, as exemplified by the following (Tr. 13,051-52):

> "One of the, of course, most notorious murders in the history of the world was the assassination of Julius Caesar at the height of that empire, the Roman empire, and William Shakespeare brought that to us in a play, 'Julius Caesar.'
>
> He has all the conspirators plotting the death of Julius Caesar, and not once does one of them say to the other, 'Let's kill him.' Not once does one suggest, 'Let's let him have it.' No. They don't speak that way.
>
> 'No man should be higher than Rome. Rome is where we are from.' What does that mean? Nothing. Nothing wrong with that.
>
> 'Brutus, you had an honorable family. You were well respected in Rome, but you always paid allegiance to Rome.' What does that mean? Not once.
>
> Yet when it came time, they were all there. Actually what this is is bringing us into the whispering, and even when we are there—they don't say anything, because they don't have to."

The jury was charged and had to accept this rule, wholly inappropriate to J&J's system of independent marketing policies for its subsidiaries, as meaning that J&J was intentionally violating the federal antitrust laws in operating StimTech.

Armed with Judge Lord's revolutionary antitrust instructions and evidentiary rulings, plaintiffs sold their theory to the

jury that J&J's conduct was motivated by an unlawful intent to suppress StimTech. The pervasive force supplied to this theory by the unprecedented antitrust rulings made by the trial court enabled plaintiffs to make the following argument to the jury: Since under the antitrust laws J&J had an affirmative duty to promote TENS against analgesic drugs and to direct its subsidiaries to compete with each other in the same territories, J&J was necessarily dealing with the plaintiffs in bad faith, thereby defrauding them and breaching its contract with them. For example, plaintiffs argued to the jury in the closing:

> "And remember that the purpose to suppress could only be achieved by this combination. The purpose to suppress could only be accomplished by getting these people to agree both to the non-compete agreement and to the contract, because the only other way that this business could be suppressed, the only other way or effort—and it couldn't; they wouldn't be able to suppress it—would be for J&J themselves in the lone to go into the business.
>
> And if they did that, all they would do is help the industry rather than hurt it. So they had to do it that way and they did it that way. And that's why they promised them anything.
>
> That's where the contract comes in and that's where the fraud comes in. And that was but the tip of the iceberg. (Tr. 13, 136).
>
> *"It all fits when you see—there's no explanation in this case at all except the intent to suppress this business. Nothing makes sense in the absence of that."* (Tr. 13,171).[5]

As noted, the jury returned verdicts of $170 million on plaintiffs' invalid antitrust theory, $31 million in compensatory and punitive damages on the fraud theory, and $5.7 million for

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5 Except where otherwise noted, emphasis herein has been added.

breach of the contract. In keeping with plaintiffs' claim that J&J had engaged in a single course of conduct motivated by its intent to suppress TENS to protect drugs, alternative judgments were entered on each of the three verdicts. As stated by plaintiffs at the time of entry of judgment (pp. 21-2):

> "We have looked long and hard at whether any of these can be added to any of the others.
>
> And although there is some authority that appears to permit it, I think the better view and the view that we've come to is that they should not be added together—*essentially because it is a single course of conduct causing a single injury, and to add them together would be a duplication.*"

Plaintiffs' January, 1983 reply brief to the Eighth Circuit states (p. 6):

> "The plaintiffs, of course, have always taken the position that this case involves a *single* course of conduct on which the plaintiffs have based different theories of liability, some antitrust and some common law, but all depending upon the same basic set of facts."

The Documented Prejudice Polluting All of Plaintiffs' Claims

In its First Opinion the Eighth Circuit reversed and dismissed the antitrust judgments, affirmed the compensatory fraud judgment of $6.275 million, and reversed and remanded for retrial the fraud punitive damage verdict of $25 million. It made no mention of the contract verdict because it affirmed the higher, alternative compensatory fraud award. In one of the rulings critical to this petition, the First Opinion found (A-25):

> "Moreover, the long trial (nearly six months) and the evidence relating to the entire antitrust claim created a prejudicial atmosphere that was compounded by plaintiffs' impermissible arguments on punitive damages."

The elements which created this "prejudicial atmosphere," apart from the punitive damage arguments, are referred to at various places in the First Opinion. As to the $500 million antitrust damage schedule which served as the centerpiece for imputing to J&J the intent to suppress TENS, the First Opinion stated (A-7):

> "Furthermore, we deem it significant the damages awarded by the jury for the antitrust violation were entirely speculative, further corroborating the lack of antitrust injury."

As to the argument which pervaded the trial that J&J was obligated under the antitrust laws affirmatively to promote StimTech and its TENS business, the First Opinion stated (A-16):

> "In this regard, it is difficult to understand just how the competition in the TENS industry was harmed—ST's [StimTech's] competitors arguably were better off by J&J's suppression of its own TEN's product. Even if the competitors were not better off, J&J had no duty to competitors or consumers to promote its own product. This is an internal, private business decision."

The prejudicial, illegal *per se* instruction was not even discussed by the majority because they found no duty under the antitrust laws requiring J&J to promote its own product, and it is beyond cavil that unilateral conduct by J&J in operating StimTech could not conceivably qualify as a conspiracy or combination to restrain trade under any concept. In discussing the plaintiffs' argument on punitive damages, which it found had "compounded" the prejudicial atmosphere created by the prolonged presentation of the unfounded antitrust suppression charges, the First Opinion stated:

> "In the present case, it is highly relevant that the malicious or oppressive conduct [to justify fraud punitive damages] must have related to the *fraud*, not the *suppression*. (emphasis in original)." (A-22)

* * *

"The record makes clear that plaintiffs argued to the jury that it could punish J&J for the suppression. Counsel used the court's punitive damages charge to inject an inflammatory remark concerning 'public damage' directly related to the alleged antitrust violation of suppression." (A-23)

* * *

"Plaintiffs ultimately asked the jury for $300 million in punitive damages [on the fraud claim]. This amount was based on the harm to the public—the chronic-pain patients that were denied access to TENS devices. Thus, we think it clear that the jury was requested to punish defendants for suppression, not for fraud. This argument was clearly prejudicial. Although the fraud may have been tangentially related to the suppression, damages for suppression were to be awarded by the jury under the antitrust claim. Our finding that these plaintiffs do not have standing to punish for antitrust violations merely enhances the prejudicial effect of the argument." (A-24-25)

In conclusion, the First Opinion found that plaintiffs' arguments not only were prejudicial, but actually had the desired effect of prejudicing the jury:

"We therefore find that the jury's $25 million punitive damages award to have been largely based upon plaintiffs' prejudicial and legally unfounded arguments." (A-25)

That finding is critical to this petition.

The Holding by the Eighth Circuit That the Prejudicial Suppression Evidence, Arguments and Instructions Polluted the Fraud Charge in its Entirety

In its first petition for rehearing, J&J pointed out to the Eighth Circuit that affirming the fraud compensatory damage award could not be squared with its own adjudication that the

trial had been conducted in a prejudicial atmosphere, and that the same arguments plaintiffs had used to obtain fraud punitive damages had also been used by them on behalf of fraud liability.

In its Second Opinion, the Eighth Circuit agreed. It reaffirmed the First Opinion's finding, critical to this petition, that the punitive damages award was in fact infected by the prejudice, and went on to rule that it would be unfair to have a remand limited to the claim for fraud punitive damages because this was a case where there was "affirmative evidence of passion or prejudice on the part of the jury other than the size of the award." Accordingly, it vacated and remanded the fraud claim for a re-trial in its entirety (C-4).

The Second Opinion, however, considered for the first time and affirmed the $5.7 million breach of contract judgment, stating:

> "Both parties agree that to prove a breach of [the contract] requires a showing of bad faith. As the district court set forth, the facts relating to J&J's actions subsequent to the 1974 contract *could* reasonably be construed by the jury to have been taken consciously and in bad faith." *Id.*

The core issue here is whether "could" constitutionally equals "should." The conclusion that a prejudiced jury "could" have found breach of contract based on non-prejudicial evidence shows why J&J's constitutional right to a fair trial has been violated: the Constitution requires reasonable assurance that the trial was actually fair.

Unexplained and Inexplicable Refusal of the Eighth Circuit To Set Aside The Polluted Verdict on the Alternative Breach of Contract Charge

J&J filed a second petition for rehearing, addressed to the point that the alternative contract verdict was polluted with the same prejudice as the fraud verdicts. A jury found to have been positively prejudiced on the alternate verdicts on the

fraud claim presumably was prejudiced on the alternate contract verdict as well. Such a presumption became conclusive here because plaintiffs' unitary claim was that J&J's supposed intent to suppress sales of TENS explained and motivated every aspect of J&J's conduct. To carry out that supposed intent J&J necessarily had to breach the contract. Thus plaintiffs stated in closing argument:

> "We charge that these people suppressed this industry, and the means to do it and the way they did it was to get the contract with these people and get the non-compete clause. They combined to suppress it. If you analyze it, if you analyze it, there is no other way they could have done it." Tr. 13,053.
>
> * * *
>
> "If they kept their promises, the company would be marketing internationally, all the up front money for the developments—this would have begun to move, the '73 display, people would have begun to know about it.
>
> They couldn't keep their promises. In order to get it, promise them anything, but afterwards, absolutely forget it, because if we honor those promises, we'll be defeating the whole purpose." Tr. 13,090.
>
> * * *
>
> "There is no other reasonable explanation for these roadblocks that they put on these people, the fraud on them—promise them anything, do nothing. As a matter of fact, do exactly the opposite. There is no other explanation.
>
> [Quoting from Judge Lord's invidious conspiracy *per se* instruction:] "Suppression of a potentially competitive product from a substantial market by a dominant competitor in that market is unlawful in and of itself." Tr. 13,123-4.
>
> * * *
>
> "Now, taking the verdict form itself, first is the breach of contract. In this we have the 'promise them anything, promise them anything.' " Tr. 13,139-40.
>
> * * *

"We respectfully submit to you that there's no question—well, I can't say no question, because that's beyond a reasonable doubt—but preponderance of the evidence clearly, clearly and substantially, indicates that they violated that contract—of course, they had to. The had to. They had to do that. They had to. And they did—and that the maximum earn-out would have been made. And the additional part is the $5.7 million." Tr. 13, 152-3.

The Eighth Circuit denied this second petition for rehearing without opinion on February 28, 1984 (D-1).

THE REASONS FOR GRANTING THE WRIT

I. The Refusal of The Eighth Circuit To Set Aside a Verdict Polluted By Passion and Prejudice Irreconcilably Conflicts With The Rulings of All U.S. Appellate Courts And Deprives The Prejudiced Party of Due Process and Its Right To Trial By An Impartial Jury

Where, as here, prejudice has been found to have positively polluted presentation of a claim, a verdict based on that claim must be set aside. Due process and preservation of the jury trial as a factfinding process require no less.

The Eighth Circuit found the inflammatory antitrust charges to be insufficient as a matter of law, and that a "prejudicial atmosphere" at trial and positive prejudice on the part of the jury polluted one of the alternate common law verdicts (the fraud), but it nevertheless affirmed the alternative contract verdict on the rationale that other non-prejudicial evidence "could" have supported this general alternate verdict. In doing so, it ignored the due process issue of whether a general alternate verdict affected by the same "prejudicial atmosphere" and evidence that required reversal of another general alternate verdict could be constitutionally affirmed. Its result violates all precedent in this area. The fair administration of justice requires remedial action by this Court.

The basic rule as to the effect of a finding of jury prejudice as to some aspect of a case is stated in *Minneapolis, St. P. & S.S.M. Ry v. Moquin*, 283 U.S. 520 (1931), as follows:

> "[N]o verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice. Obviously such means [prejudicial conduct] may be quite as effective to beget a wholly wrong verdict as to produce an excessive one. A litigant gaining a verdict thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent." *Id.* at 521-22.

Indeed, until this case, every circuit court deciding the issue has adhered to the common sense proposition that a jury found to be prejudiced as to some aspect of a case is unlikely to be free from prejudice as to the other interrelated aspects.[6]

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6 *E.g.*, Second Circuit: *Northeastern Tel. Co. v. Am. Tel. & Tel. Co.*, 651 F.2d 76, 94-5 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *Koufakis v. Carvel*, 425 F.2d 892, 894 (2d Cir. 1970); Third Circuit: *Stanton v. Astra Pharmaceutical Products*, 718 F.2d 553 (3d Cir. 1983); *Romer v. Baldwin*, 317 F.2d 919, 922-23 (3d Cir. 1963); Fourth Circuit *Ford Motor Co. v. Mahone*, 205 F.2d 267 (4th Cir. 1953); Fifth Circuit: *Edwards v. Sears, Roebuck*, 512 F.2d 276, 283 (5th Cir. 1975); *Williams v. Slade*, 431 F.2d 605, 608 (5th Cir. 1970) ("If the decision on the other issues could in any way have been infected by the error then a new trial must be had on all issues."); Sixth Circuit: *Cleveland v. Peter Kiewit & Sons'*, 624 F.2d 749, 760 (6th Cir. 1980); *Thompson v. Camp*, 167 F.2d 733, 734 (6th Cir.), *cert. denied*, 335 U.S. 824 (1948); D.C. Circuit: *Camalier & Buckley-Madison, Inc. v. Madison Hotel*, 513 F.2d 407, 422 (D.C. Cir. 1975). *See also:* 6A Moore's *Federal Practice* ¶ 59.08[7], p. 59-199 (1983); 11 Wright & Miller *Federal Practice and Procedure* § 2815 p. 103 (1983). The Eighth Circuit itself used to follow this rule. *Vagie v. Pickands Mather & Co.*, 611 F.2d 1212, 1219 (8th Cir. 1979), *cert. denied*, 444 U.S. 1033 (1980) ("[B]ecause we cannot state with reasonable assurance that the erroneous instructions on the issue of vicarious liability did not influence or materially affect the jury's verdict, we reverse and remand for a new trial on the issue of damages as well as liability."); *Richardson v. Communications Workers of America*, 530 F.2d 126, 130 (8th Cir.), cert. denied, 429 U.S. 824 (1976); *Lowery v. Clouse*, 348 F.2d 252, 256 (8th Cir. 1965).

As stated in *City of Cleveland v. Peter Kiewit Sons' Co.*, 624 F.2d 749, 759 (6th Cir. 1980), "since the jury was prejudiced with respect to its award of damages, it cannot be said that its finding of liability was free from prejudice." It is the rule in all of the circuits that a retrial limited to the issue of damages cannot be employed where there is an explicit finding of jury passion and prejudice, as opposed to a possible inference of prejudice solely from the size of an excessive verdict.[7]

In fact, it was the Eighth Circuit's affirmative finding of actual prejudice which precluded a remittitur giving plaintiffs the option of taking the fraud compensatory damage verdict. As it explained in its Second Opinion:

> "A further question is whether this is 'one of those exceptional cases in which justice would be served by sustaining the actual damage award upon condition that plaintiff elects to file remittitur of all exemplary damages.' *Bankers Life & Casualty Co. v. Kirtley*, 307 F.2d 418, 426 (8th Cir. 1962). We think it is not. In *Bankers Life* the exemplary damages award was found excessive merely because of the size. There was no affirmative evidence of passion or prejudice on the part of the jury other than the size of the award, a factor the court took care to note. Here, however, we found that the punitive damages award was influenced by prejudicial statements in the closing argument. We therefore find that a remittitur is not proper." (C-3, n. 1).

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7 *E.g., Draper v. Airco, Inc.* 580 F.2d 91, 97 (3d Cir. 1978); *Compare Lowe v. General Motors Corp.*, 624 F.2d 1373, 1383 (5th Cir. 1980) ([T]he law in the Fifth Circuit is that if a judge finds a jury verdict to result from passion or prejudice, the proper remedy is a new trial, and not remittitur.") *with Arnold v. Eastern Airlines, Inc.*, 681 F.2d 186, 206 (4th Cir. 1982), *cert. denied*, 103 S. Ct. 1801 (1983) ("Remittitur may properly be used to remedy an excessive award of damages made by a properly instructed jury if the award is not attributable to passion or prejudice.") *See also Malandris v. Merrill Lynch, Pierce, Fenner & Smith*, 703 F.2d 1152 (10th Cir. 1981), *cert. denied*, 104 S. Ct. 92 (1983).

Due process and preservation of the jury trial as a fact finding process require no less.

The Eighth Circuit itself has previously recognized that a jury prejudiced on one matter in a case is likely to be prejudiced as to all interrelated claims. Thus in *Mueller v. Hubbard Milling Co.*, 573 F.2d 1029, 1040 (8th Cir.), *cert. denied,* 439 U.S. 865 (1978), it was faced with two separate general verdicts for related but still separate and *independent* wrongs, one of which was demonstrably the result of passion and prejudice and the other was not. It reversed both, explaining:

> "Both claims were tried to the same jury. The passion and prejudice which led to the grossly excessive verdict on Dakota 16 may well have influenced the jury on the liability issues on both Dakota 14 and 16."

Here the claim underlying the contract verdict is far more than merely "interwoven" with the reversed or dismissed verdicts (the standard test for determining whether any verdict may stand where others in the same case have been found to result from prejudice). It is the same as that underlying the other verdicts.

Thus affirmance by the Eighth Circuit here of the alternate contract verdict notwithstanding its having found affirmative evidence of passion or prejudice on plaintiffs' unitary claim stands in stark opposition to the holdings of all prior cases in the federal courts of appeal. The Court should grant certiorari to resolve the constitutional conflict among the circuits.

That the conflict is of constitutional dimensions is made clear by this Court's decision in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931), where this Court formulated the rule for *any* partial retrial, which has been consistently followed by *all* of the circuits until the revolutionary ruling made by the Eighth Circuit here:

> "Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that

> the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. . . . Here the question of damages on the counterclaim is so *interwoven* with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial."

Id. at 500 (citations omitted).

The Court of Appeals' affirmance of the alternative contract verdict in the face of affirmative evidence of passion and prejudice, makes clear that it has broken with the other circuits and has done so at a constitutional level. Henceforth *Moquin* is an optional rule in the Eighth Circuit, to be applied when, as and if the Eighth Circuit wishes. Henceforth evidence and arguments adjudicated to be prejudicial and concededly relevant to *all* claims can be ignored with respect to any particular verdict the appeals court wants to affirm. This result is not only manifestly unfair, but it gives such an overt appearance of unfairness that it tends to undermine respect for the federal judicial process.

This adjudicated jury prejudice on what plaintiffs themselves concede to be "the single issue underlying all of plaintiffs' claims" makes the Eighth Circuit's affirmance on one alternate theory truly extraordinary (Pl. Pet. for Rehearing to the Eighth Cir. p. 4). In this case plaintiffs concocted a patently sham and prejudicial antitrust suppression theory and used it to inflame the jury to secure verdicts on the same claim made on fraud and breach of contract theories. Although the prejudicial "suppression" theory is struck down as without logical or legal support, plaintiffs have come away from court with a mammoth contract verdict. They have done so despite the fact that it was unquestionably the fruit of that suppression theory.

This Court should not allow the overruling of *Moquin* and *Gasoline Products* in this case to stand. The decision of the Court of Appeals clearly signals the bar that provocation of a

jury by outrageously prejudicial evidence and arguments will no longer be penalized, but on the contrary may be handsomely rewarded, if an appellate court in its unexplained option elects to do so. Affirmance on one of such alternate claims denies a fair trial to the party on whom the prejudice has been inflicted.

The two arguments resorted to by plaintiffs to obscure the benefits they have reaped from such prejudice are spurious. First they argue that the Eighth Circuit reversed the fraud verdicts solely because of the one short prejudicial closing argument made by plaintiffs and quoted in the First Opinion. The Eighth Circuit specifically rejected plaintiffs' antitrust suppression argument *in toto*. It ruled that "J&J had no duty to competitors or consumers to promote its own product", (A-16), and found that the prejudice inherent in presenting "the prejudicial and legally unfounded" suppression antitrust claims (to which most of the six month trial was devoted) polluted the fraud verdicts. The second argument is that J&J "waived" the error inherent in this mountain of prejudice by failing to object to the closing argument devoted to suppression and because J&J commented from time to time that the trial was being conducted in a fair fashion.[8] The basic unfairness to which J&J timely objected both at the trial and appellate court levels, consisted of the trial court's rulings that the jury could find J&J guilty of a breach of a duty under the antitrust laws to promote its own product. All of plaintiffs' inflammatory evidence and arguments were within the scope of these prejudicial substantive rulings and charges to which J&J objected.

In short, affirmance of an alternate verdict on an underlying claim polluted by documented prejudicial arguments, evidence

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8 The remarks made by counsel for J&J were made in the course of dissuading Judge Lord from transgressing the bounds of procedural propriety, such as stopping him from his announced intention to have lunch with the jury and to desist from making *ex parte* communications with the jury during their deliberations (Tr. 8052-56).

and charges because other evidence "could" have supported it injects an element of overt lawlessness into federal appellate reviews. One of the thirteen federal courts of appeals should not be permitted to continue to exercise an option to affirm polluted verdicts as it wishes. If use of general verdicts is to continue,[9] fairness requires that they be free of the taint of adjudicated prejudice. Litigants should be as much entitled to a fair trial in the Eighth Circuit as they are in the rest of the country. Thus, the writ should be granted on this issue.

II. The Decision of the Court of Appeals Requires Review Because it Rewards Plaintiffs For Prosecuting An Antitrust Claim Which Threatens To Chill Transfers, Development, and Marketing of Technological Innovations

The second reason for granting the writ is related to the first. It is based on the common practice, nowhere better exemplified than in this case, of plaintiffs' misusing the antitrust laws as vehicles for inflaming juries in common law cases. Where, as here, the antitrust claim is legally insufficient, but is not dismissed until after the jury has been prejudiced, the resulting common law verdicts are really the fruits of invalid antitrust charges and, as such, subvert the goals of the antitrust laws. Moreover, the known ability of adventuresome plaintiffs and their counsel to successfully misuse the antitrust laws in this way creates a chilling effect on the freedom of business to engage in pro-competitive, socially useful conduct. The instant case presents an appropriate vehicle for this Court to put the bar on notice that such misuse of the antitrust laws will no longer be countenanced and to remove the incentive for plaintiffs to append knowingly insufficient antitrust claims to common law claims.

As noted above, the common charge underlying all three of plaintiffs' theories, contract, fraud and antitrust, was J&J's

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9 The trial court, over J&J's objection, insisted on submitting each of the alternate claims on general verdicts.

failure to expand the market for TENS devices as much as the jury believed it should have. It was the pernicious and inherently anti-competitive thrust of this "suppression" theory that prompted the Department of Justice (the "Department"), to submit an *amicus* brief to the Eighth Circuit urging dismissal of the antitrust claim. The jury was told that this same "suppression" as defined by the antitrust instructions discussed above constituted "bad faith" on the part of J&J—the ultimate issue on the contract claim. In affirming the contract claim the Eighth Circuit effectually engrafted this antitrust suppression theory into the contract verdict.

As the Department explained in its Eighth Circuit amicus brief, this "suppression" theory is actually anticompetitive (p. 4):

> "Any decision to limit or forego development of a particular product can be characterized as 'suppression,' and there will virtually always be some disappointed party ready to sue if antitrust treble damages are available. The risk that juries might impose significant antitrust liability for innovation 'suppression' is likely to deter innovation transfers beneficial to society."

As the Department further noted, TENS devices are not patented. Moreover, entry is relatively easy and no firm dominates the market. Based upon the foregoing, the Department observed that "[w]here the innovation is known and especially where, as in this case, it is already being marketed by a number of firms, the innovation cannot be 'suppressed' in the literal sense." (p. 13) It further stated (p. 4):

> "We submit that, in these circumstances, allowing a court or jury to assess a firm's motivation for a unilateral decision to limit or cease commercialization of an unpatented innovation and to impose treble damage liability if it finds an intent to 'suppress' will impair rather than further the fundamental pro-competitive purposes of the antitrust law."

In its *amicus* brief the Department indicated that it took "no position on the fraud and breach of contract claims" (p. 20), but it noted plaintiffs' contention that the identical conduct underlying the antitrust charges, alleged "suppression" of StimTech, also constituted their breach of contract claim (p. 2):

> "Appellees contended . . . that J&J intentionally had kept StimTech close to the point of extinction while devoting substantial resources to the manufacturing and sale of pain control drugs. This, appellees contended, constituted an illegal suppression of competition, *as well as a breach of contract,* since J&J's pain control drugs were used to treat the same pain conditions that could have been treated effectively with TENS."

The Department also argued that use of the type of contract employed by the parties in this case, which involved an earnout provision by which the risk of the future prospects of the innovation was shared by the buyer and seller, should be encouraged, rather than discouraged (p. 10):

> "The widespread use of agreements in which the sale price is a function of future profits provides strong reason to believe that such profit or risk sharing agreements facilitate acquisitions of innovations of unproven commercial value. Society should not discourage such agreements, because they facilitate the transfer of assets in a manner designed to maximize their economic productivity and social value."

Accordingly, the Department concluded (p. 16):

> "[T]hat a quest for the highly improbable, and thus relatively few, suppression cases not only would involve unnecessary and unproductive use of judicial resources, but, even more importantly, could result in liability for entirely proper, post-acquisition reassessments of the commercial potential of a particular product.
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> * * *

> Far from promoting the development of new products and new markets, the threat of antitrust liability for post-acquisition business decisions that might be seen as evidence of a pre-acquisition intent to suppress could deter acquisitions by firms having the necessary resources and the willingness to take the business risks involved in the development of new products. (Footnote omitted.)

This fear of liability for such "suppression" is not without basis. The same attorneys for the plaintiffs in this action are also suing J&J in the District of Massachusetts at common law for "suppression" of an electronic thermometer called "MEDI-TEMP." That case, *Turner v. Johnson & Johnson,* whose antitrust claim was dismissed for lack of standing, is discussed in the Eighth Circuit's First Opinion (A-8, n.6). As noted in that footnote, J&J is charged with having "suppressed MEDI-TEMP by not providing sufficient funding, manpower, or equipment to develop and market the product." In a related case, J&J is also currently being sued in the District of Minnesota for failure to develop, *i.e.*, "suppressing," an electrode for use in TENS devices by the claimed inventor thereof, *Lectec v. Johnson & Johnson,* Civ. Act. No. 3-81-644.

The comments of electronic industry representatives in recent House hearings on H.R. 1952 and 3393 relating to the encouragement of formation of R&D ventures make it plain that private suits for "suppression" of the type involved here threaten cooperative pursuit of innovation by industry at the research and development stage.[10] As Congressman Zschau explained at these hearings:

> "A recent example illustrates the disincentives to forming R&D joint ventures. The visionary chairman of Control

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10 Research and Development Joint Ventures: Hearing on H.R. 1952 and 3393, Before the Subcomm. on Science, Research and Technology of the House Comm. on Science and Technology, 98th Cong., 1st Sess. 1, 2, 13, 23, 57, 83 (1983).

> Data Corporation, William Norris, recognizing the competitive threat to America's computer industry posed by consortiums of companies from abroad, formed an R&D joint venture—Microelectronics and Computer Technology Corporation (MCC)—to develop advanced computer hardware and software technology. Even though detailed conditions to ensure competitiveness . . . were written into its by-laws and its formation was 'blessed' by the Justice Department [through a clearance letter], the MCC founders soon received a letter from San Francisco attorney Joseph Alioto . . . putting MCC on notice that its continued operation could trigger an antitrust action and possible treble damages.
>
> [Thus] . . . the risk of a costly and time-consuming antitrust action, *no matter how unjustified,* must be added to the already large technical and market risks in their daring project. (Emphasis added).

The letter from Mr. Alioto, who is representing plaintiffs in this case against J&J, to Mr. Norris and other chief executives of firms entering into the joint venture threatening legal action for such "suppression" is annexed hereto as Appendix F.

In recent hearings on this year's version of the same bill, H.R. 5041, the House Report, H.R. Rep. 98-656, 98th Cong., 2d Sess., (1984), again noted that although the Department of Justice has not filed antitrust suits which have the effect of stifling competition, the private plaintiffs' antitrust bar has done so, and with chilling effect (pp. 1041):

> "These hazards are generally thought to include: the ease with which an antitrust cause of action may be inititated, the heavy and protracted expense of antitrust litigation, and the risk of substantial treble damages or crippling injunctions."

As made clear by these House proceedings seeking to encourage research and development, as well as by the *amicus* brief of the Department in this case, successful marketing of an innovation which will make a meaningful contribution to the economy usually requires a transfer from the inventor to an established company with the necessary marketing know-how and financial resources. Such agreements are, as the Department brief noted, "essential to efficient commercialization of new products." In addition, as was recently described for the President's Commission on Industrial Competitiveness, such transfers are necessary to compete with well-directed and well-financed international competition in the field of emerging technology. Endorsement of the "suppression" theory below, whether through directly validating the antitrust theory or indirectly doing so by transporting it into the common law area, defeats these purposes. The Eighth Circuit's decision here encourages the plaintiffs' antitrust bar to continue to assert sham antitrust charges as a stratagem for inflaming juries and prejudicially obtaining common law damages. As the Department brief suggests, encouraging the bringing of such suits against purchasers and developers of new technology is an anticompetitive use of the nation's antitrust laws and should not be countenanced.

Respectfully submitted,

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